IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.5206 OF 2005

George Varghese ...Applicant

Vs.

Mrs Dhanji Motaey & Ors. ...Respondents

Shri Rajesh B. Parab i/by Shri K. Balkrishnan for the Applicant.
Shri Milind More for the Respondent No.1.
Shri Rajesh More, A.P.P. for the State.

CORAM : A. S. OKA, J.
DATE : SEPTEMBER 18, 2006.

P.C.:

1. Heard the Advocates appearing for the parties. By order dated 25th August, 2006 the Advocates appearing for the parties were put to notice that on the next date, the Application/Appeal will be heard finally. Accordingly, on the last date I have heard the Advocates appearing for the parties.

2. Leave to prefer Appeal against acquittal is granted. Appeal is admitted. The Advocate appearing for the Respondent No.1 waives service. The learned A.P.P. waives service for the Respondent No.2. Taken up for hearing forthwith.

3. The Applicant is the complainant in a complaint

under section 138 of the Negotiable Instruments Act, 1881. By order dated 28th June, 2005 the learned Metropolitan Magistrate dismissed the complaint for want of prosecution as the Appellant and his Advocate were absent. The said order was passed in exercise of powers under section 256 of the Code of Criminal Procedure, 1973.

4. The learned Advocate appearing for the Applicant submitted that the learned Magistrate ought not to have dismissed the complaint on account of absence of the Applicant, especially when the complaint was pending from the year 2000. He submitted that in paragraph No.4(e) of the Application for leave, sufficient explanation has been given for the absence of the Applicant.

5. The learned Advocate appearing for the Respondent No.1 pointed out entries in the roznama of the proceedings annexed to affidavit-in-reply filed by the Respondent No.1. He submitted that after recording of plea of the accused, the Applicant has never attended the date fixed in the complaint. He submitted that the Respondent No.1 has been all along attending to the complaint and if complaint is restored,

prejudice will be caused to the Respondent No.1. He submitted that there is no explanation whatsoever for the absence of the Applicant on atleast last three dates fixed in the complaint.

6. The learned Advocate for the Applicant stated that the Applicant is ready and willing to pay costs to the Respondent No.1 and accordingly he has handed over a demand draft in the sum of Rs.5,000/- drawn in favour of the first Respondent to the Advocate appearing for the first Respondent.

7. I have considered the submissions made before me. The complaint is filed on 12th June, 2000. Thereafter, the complaint was adjourned from time to time. It appears that on 27th January, 2005 the Applicant was present and even the first Respondent was present. On that day plea of the first Respondent was recorded. Thereafter, the complaint was kept on 11th April, 2005, 10th May, 2005, 10th June, 2005 and 28th June, 2005. Out of the said four dates on three dates the Applicant and his Advocates were not present. On 10th May, 2005, the complaint was adjourned as the learned Metropolitan Magistrate was on leave. However, it is not noted in the roznama that on that day the

Applicant was absent.

8. The Applicant has been diligently prosecuting the complaint from June 2000. It is true that he was absent on atleast last two dates and that is the reason why the learned Metropolitan Magistrate has invoked the provisions of section 256 of the said Code. However, it is to be borne in mind that the complaint is under section 138 of the said Act of 1881. The legislative intent has to be kept in mind while dealing with such complaint. The Apex Court in one of the cases has observed that by section 138 of the said Act of 1881, a civil transaction has been made an offence by legal fiction. In the present case, there is some explanation for absence given by the Appellant on the day on which the impugned order was passed. Moreover, the Applicant has paid sum of Rs.5,000/- by way of costs to the first Respondent. In my view, one more opportunity deserves to be granted to the Applicant to prosecute the complaint by setting aside the impugned order and by restoring the complaint.

9. Hence, I pass the following order:

(i) Appeal is partly allowed.

(ii) The complaint being C.C.No.5022/S/2002 is restored to the file of the learned Metropolitan Magistrate, 10th Road, Andheri, Mumbai by setting aside order dated 28th June, 2005.

(iii) The parties are directed to appear before the learned Trial Judge on 06th November, 2006 at 11.00 a.m.

(iv) It is made clear that the Applicant will not be entitled to seek adjournment on any unreasonable ground and the Appellant will remain present on the dates fixed and will co-operate with the learned Trial Judge for early disposal of the complaint.

(v) All contentions of the parties on the merits of the pending complaint are expressly kept open.

(vi) Writ of this order be sent to the concerned Court immediately.

JUDGE